Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–04–239 OF 2004

GOPAL SRI RAM, MOHD GHAZALI AND AZMEL JJCA
24 NOVEMBER 2005

Arbitration — Award — Setting aside — Arbitrator awarded interest on sum claimed only from date of award and not from date of accident — Whether there was error of the face of award — Arbitrator had passed away and no remitting order could be made — Whether court empowered to make any order which ought to have been given or made, and make such further or other orders as the case requires — Courts of Judicature Act 1964 s 69(4)

Arbitration — Award — Setting aside — Life insurance — Duty of disclosure — Appellant held policies from defendants — Claim under policies — Plaintiff disclose policies with other insurance companies to an agent of insurer who witnessed the proposal form — Whether disclosure made to 'a person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity' — Whether there was error on the face of award — Insurance Act 1963 s 44A — Whether arbitrator placed a narrow and restrictive interpretation on s 44A of the Insurance Act 1963

Insurance — Life insurance — Duty of disclosure — Appellant held policies from defendants — Claim under policies — Plaintiff did not disclose policies with other insurance companies — Whether facts were material and non-disclosure influenced defendants

The appellant was seeking a reversal of the High Court's judgment refusing to set aside an arbitrator's award. The award relates to claims made by the appellant against four different insurance companies on personal accident policies he had taken out with each of them, namely: (i) QBE Insurance (M) Sdn Bhd ('QBE'); (ii) Malaysia & Nippon Insurans Bhd ('Nippon'); (iii) The Great Easterm Life Assurance Co Ltd ('Great Eastern'); and (iv) MUI Continental Insurance Sdn Bhd ('MUI'). On the QBE policy, the original policy was issued on 7 March 1991. It was effective until 6 March 1992. During the currency of this personal accident policy, the appellant had obtained two life insurance policies from two other insurance companies. The original policy was renewed on 6 March 1992 for a further period of one year. The renewal was by means of a renewal certificate which, inter alia, said that the policy had been renewed for the stipulated period 'subject to all terms, conditions and endorsements' in the original policy. The accident in respect of which the appellant made his claim occurred on 26 June 1992. QBE repudiated liability and refused to pay. It said that there had been non-disclosure of a material fact by the plaintiff. Because he had not disclosed the life insurance policies when he had the policy renewed. To justify its repudiation, it relied on both the proposal form in respect of

the original policy as well as cl 6.3 of the policy. On the Nippon policy, it was not disputed that the original Nippon policy was issued for the period 25 February 1991 to 24 February 1992. On 17 February 1992, a fresh policy was issued for the period 25 February 1992 to 24 February 1993. There was no renewal certificate as there was in the QBE case. There was no incorporation clause as was housed in the QBE renewal certificate. There was no QBE policy cl 6.3 in the Nippon policy. There was no fresh proposal form. There was nothing in the second policy to say that it was issued pursuant to the earlier proposal form. On the Great Eastern policy, Great Eastern issued a personal accident policy to the appellant valid for one year. It was based on a proposal form dated 13 March 1992. It contained the following question: 'What Accident, Sickness or Life Insurance do you now carry or applied for?' The answer that appears in the form discloses two life policies and one personal accident policy. In fact, the appellant had two life and seven personal accident policies. The learned arbitrator found as a fact that the appellant had disclosed all these nine policies to an agent of Great Eastern who witnessed the proposal form. The learned arbitrator found for Great Eastern on the ground that the disclosure to agent was not disclosure to Great Eastern. On the MUI policy, the learned arbitrator found for the appellant. But he awarded interest on the sum claimed only from the date of the award and not from the date of the accident. And he gave no reasons for not making the award.

Held:

(1) When a policy of insurance for a fixed period is renewed by mutual consent, the original proposal form becomes incorporated into the renewed policy and continues to form the basis of the contract. And more so in the present case where the renewal certificate expressly states that the renewal is 'subject to all terms, conditions and endorsements in your original policy', it includes the declarations in the original proposal form which formed the basis of the contract. They too became part of the renewed policy. The appellant said to QBE in the renewed policy that he did not have any life insurance. That was a material fact because of the basis clause. But it was untrue. Hence QBE was clearly within its contractual rights to refuse payment (see paras 10–11).

(2) There was no doubt that Nippon's original policy and its second policy are two different contracts. The appellant was duty bound to disclose the other personal accident policies to Nippon before it issued the second policy. Nippon considered the existence of other personal accident policies to be of significant importance to it. That is why it had put the question about it in its original proposal form. The appellant had answered that question in the negative. His answer was true at the time he gave it. But it was no longer true when the second policy was issued. The appellant must, as a reasonable man be taken to have known the importance that Nippon attached to the existence of other personal accident policies. Accordingly, the materiality of the fact not disclosed by the appellant was inferentially established before the learned arbitrator. The learned arbitrator was therefore entirely correct as a matter law in rejecting the appellant's claim against Nippon (see paras 22–23).

(3) The learned arbitrator placed a very narrow and restrictive interpretation on s 44A of the Insurance Act 1963. He construed the words 'a person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity' as enabling an insurer to place limits on the agent's authority. But s 44A does not admit that. It speaks of the authority in general terms. It does not say that the agent must be authorised to deal with a specific type of insurance. By reading it restrictively the learned arbitrator was introducing a further exception to those already provided by sub-s 44(3). That amounted to unauthorised legislation. The award in respect of the appellant's claim against Great Eastern was fatally flawed by an error of law and must be set aside (see paras 30–31).

(4) The learned arbitrator awarded interest on the sum claimed on the MUI policy only from the date of the award and not from the date of the accident and he gave no reasons for not making the award. There was irregularity of action inconsonant with the general principles of equity and good conscience because the learned arbitrator, without reasons departed from the established principle of awarding interest on a debt. In the ordinary way, the court would remit the award to the arbitrator with the appropriate direction to him. But in the present case, the learned arbitrator has passed away and no remitting order can therefore be made. Section 69(4) of the Courts of Judicature Act 1964 empowers the court to 'make any order which ought to have been given or made, and make such further or other orders as the case requires'. The section enables the court to do complete justice between the parties. The court has ample jurisdiction and powers to deal with difficulty that has arisen in the present instance. There is nothing in the Arbitration Act 1952 that prohibits the court from making an award of interest in a case as the present. To meet the ends of justice the court ordered that the learned arbitrator's award in respect of MUI to bear interest at the rate of 8 % from the date of the accident (see paras 32–37).

[Bahasa Malaysia summary

Perayu memohon pengakasan penghakiman Mahkamah Tinggi yang enggan menepikan award penimbangtara. Award itu berkiatan tuntutan yang dibuat oleh perayu terhadap empat syarikat insurans untuk polisi kemalangan peribadi berbeza yang beliau telah mabil daripada setiap daripada mereka, iaitu: (i) QBE Insurance (M) Sdn Bhd ('QBE'); (ii) Malaysia & Nippon Insurans Bhd ('Nippon'); (iii) The Great Easterm Life Assurance Co Ltd ('Great Eastern'); dan (iv) MUI Continental Insurance Sdn Bhd ('MUI'). Berdasarkan polisi QBE, polisi asal telah dikeluarkan pada 7 Mac 1991. Ia efektif sehingga 6 Mac 1992. Semasa polisi kemalangan peribadi hisup, perayu telah mendaptkan dua polisi insurans hayat daripada dua syarikat insurans lain. Polisi asal itu telah diperbaharui pada 6 Mac 1992 untuk tempoh satu tahun lagi. Pembaharuan tersebut adalah melalui sijil pembaharuan yang, antara lain, menyatakan bahawa polisi tersebut telah diperbaharui untuk tempoh yang ditetapkan 'tertakluk kepada semua terma, syarat dan pengindorsan' dalam polisi asal. Kemalangan yang mana perayu telah membuat tuntutan beliau berlaku pada 26 Jun 1992. QBE tidak mengaku liabiliti dan enggan membayar.

Ia berkata terdapt ketidakdedahan fakta penting oleh plaintif. Ia disebabkan beliau tidak mendedahkan polisi insurans nyawa apabila belliau memperbaharui polisi itu. Untuk menjustifikasikan penolakannya ia bergantung kepada kedua-dua borang cadangan berkaitan polisi asal dan juga fasal 6.3 polisi itu. Berkaitan polisi Nippon, ia tidak mempertikaikan bahawa polisi asal Nippon telah dikeluarkan untuk tempoh 25 Februari 1991 hingga 24 Februari 1992. Pada 17 Februari 1992 satu polisi baru telah dikeluarkan untuk tempoh 25 Februari 1992 hingga 24 Februari 1993. Tiada sijil pembaharuan seperti dalam kes QBE. Tiada fasal penubuhan sepertimana terdapat dalam sijil pembaharuan QBE. Tiada fasal 6.3 polisi QBE dalam polisi Nippon. Tiada borang cadangan baru. Tiada apa-apa dalam polisi kedua untuk mengatakan bahawa ia telah dikeluarkan berikutan borang cadangan sebelumnya. Berhubung polisi Great Eastern, Great Eastern telah mengeluarkan satu polisi kemalangan peribasi kepada perayu sah selama setahun. Ia berdasarkan borang cadangan bertarikh 13 Mac 1992. Ia mengandungi soalan berikut: 'What Accident, Sickness or Life Insurance do you now carry or applied for?' Jawapan yang kelihatan dalam borang itu menunjukkan dua polisi nyawa dan satu polisi kemalangan peribadi. Bahkan, perayu mempunyai dua polisi nyawa dan tujuh polisi kemalangan peribadi. Penimbangtara yang bijaksana mendapati bahawa pada hakikatnya perayu telah mengemukakan kesemua sembilan polisi tersebut kepada ejen Great Eastern yang menyaksikan borang cadangan itu. Penimbangtara bijaksana memutuskan bagi pihak Great Eastern atas alasan bahawa pendedahan kepada ejen itu bukan satu pendedahan kepada Great Eastern. Berhubung polisi MUI, penimbangtara bijaksana memutuskan bagi pihak perayu. Namun, beliau mengawardkan faedah ke atas jumlah yang dituntut sahaja daripada tarikh kemalangan. Dan beliau tidak memberikan sebab membuat award itu.]

Diputuskan:

(1) Apabila satu polisi insurans untuk tempoh tetap diperbaharui dengan persetujuan bersama, borang cadangan asal digabungkan dengan polisi yang diperbaharui itu dan berterusan membentuk asa kontrak. Begitu juga dalam kes ini di amna sijil pembaharuan dengan jelas menyatakan bahawa pembaharuan tersebut adalah 'tertakluk kepada semua terma, syarat dan pengindorsan dalam polisi asal anda', ia termasuklah deklarasi dalam borang cadnagan asal yang membentuk asa kontrak itu. Itu juga membentuk sebahagian daripada polisi yang diperbaharui. Perayu berkata kepada QBE dalam polisi yang diperbaharui bahawa beliau tidak mempunyai apa-apa insurans nyawa. Itu adalah fakta penting kerana ia merupakan fasal asas. Namun ia tidak benar. Justeru itu QBE jelas dalam hak kontraktualnya untuk enggan membuat bayaran (lihat perenggan 10–11).

(2) Tidak diragui bahawa polisi asal Nippon dan polisi keduanya adalah dua kontrak berbeza. Perayu wajib untuk mendedahkan polisi-polisi kemalangan peribadi lain kepada Nippon sebelum ia mengeluarkan polisi kedua. Nippon menganggap kewujudan polisi-polisi kemalangan peribadi lain mempunyai kepentingan kepadanya. Itu sebanya ia telah mengutarakan soalan berhubungnya dalam borang cadangan asalnya. Perayu telah menjawab soalan itu secara negatif. Jawapannya adalah benar pada masa diberikan. Namun ia tidak benar lagi apabila polisi kedua dikeluarkan. Perayu, sebagai seorang yang

munasabah sepatut mengetahui kepentingan yang Nippon sertakan terhadap kewujudan polisi-polisi kemalangan peribadi lain. Sewajarnya, fakta penting yang tidak didedahkan oleh perayu berdasarkan inferens telah dikemukakan di hadapan penimbangtara bijaksana. Penimbangtara bijaksana adalah betul dari segi undang-undang untuk menolak tuntutan perayu terhadap Nippon (lihat perenggan 22–23).

(3) Penimbangtara bijaksan menggunakan tafsiran yang sempit dan terbatas berkaitan s 44A Akta Insurans 1963. Beliau mentafsirkan perkataan-perkataan 'a person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity' sebagai memberikan pemberi insurans untuk meletakkan had terhadap kuasa ejen. Namun s 44A tidak mengakuinya. Ia menyebut tentang kuasa secara am. Ia tida menyebut bahawa ejen hendaklah diberi kuasa untuk mengendalikan insurans jenis spesifik. Dengan membacanya secara terbatas, penimbangtara memperkenalkan pengecualian tambahan selain daripada yang sedia ada diperuntukkan oleh sub-s 44(3). Ini membentuk perundangan yang tidak diberi kuasa. Award berkaitan tuntutan perayu terhadap Great Eastern adalah cacat disebabkan kesilapan undang-undang dan patut diketepikan (lihat perenggan 30–31).

(4) Penimbangtara bijaksan telah mengawardkan faedah ke atas jumlah yang dituntut untuk polisi MUI hanya daripada tarikg award dan bukan daripada tarikh kemalangan dan beliau tidak memberi sebab tidak membuat award itu. Terdapat salah laku tindakan yang tidak sesuai dengan prinsip-prinsip am ekuiti dan sikap jujur kerana penimbangtara bijaksana, tanpa sebab telah terpesong daripada prinsip-prinsip tetap mengawardkan faedah ke atas hutang. Secara biasanya, mahkamah akan meremitkan award kepada penimbang tara dengan arahan bersesuaian kepada beliau. Namun dalam kes ini, penimbangtara bijaksana telah meninggal dunia dan tiada perintah remit boleh dibuat. Seksyen 69(4) Akta Mahkamah Kehakiman 1964 memberi kuasa kepada mahkamah untuk 'make any order which ought to have been given or made, and make such further or other orders as the case requires'. Seksyen tersebu membolehkan mahkamah berlaku adil terhadap pihak-pihak. Mahkamah mempunyai bidang kuasa dan kuasa yang cukup untuk menangani kesukaran yang timbul dalam keadaan semasa. Tiada apa-ap dalam Akta Timbangtara 1952 yang melarang mahkamah daripada membuat award untuk faedah dalam suatu kes seperti ini. Demi berlaku adil, mahkamah telah memerintahkan agar award penimbangtara bijaksana berkaitan MUI untuk menanggung faedah pada kadar 8% daripada tarikh kemalangan (lihat perenggan 32–37).

Notes

For cases on duty of disclosure of life insurance, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 146–149.

For cases on setting aside of arbitration award, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1202–1245.

Cases referred to

Artic Builders & Co (Pte) Ltd v Tan Tong Meng Co (Pte) Ltd [1984] 2 MLJ 5 (refd)
Banaue Financiere Pe La Cite SA v Westeate Insurance Co Ltd [1991] 2 AC 249 (refd)
CE Heath Underwriting & Insurance (Australia) Ptv Ltd v Edwards Dunlop & Co Ltd (1992) 112 ALR 161 (refd)
China Insurance Co Ltd v Ngau Ah Kau [1972] 1 MLJ 52 (refd)
Executive Engineer v DN Senapati AIR 1980 Orissa 74 (refd)
Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489 (refd)
Katotikidis v Mr Submarine Ltd [2002] ACWSJ 10135 (refd)
Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789 (refd)
Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd [1994] 2 MLJ 51 (refd)
Mann Macneal & Steeves Ltd v Capital & Counties Insurance Co Ltd [1921] 2 KB 300 (refd)
Manufacturers' Mutual Insurance Ltd v John H Boardman Insurance Brokers Ptv Ltd 120 ALR (refd) March Cabaret Club & Casino Ltd v London Assurance Ltd [1975] 1 Lloyds Rep 169 (refd)
Maschke Estate v Gleeson (1986) 54 OR (2d) 753 (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)
Murtadza bin Mohamed Hassan v Chong Swee Pian [1980] 1 MLJ 216 (refd)
Newsholme Bros v Road Transport and General Insurance Co Ltd [1929] 2 KB 356 (refd)
Pacific Centre Sdn Bhd v United Engineers (M) Bhd [1984] 2 MLJ 143 (refd)
Rozanes v Bowen (1928) 32 L1L Rep 98 (refd)
Schoolman v Hall [1951] Lloyd's Rep 139 (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
Syarikat Uniweld Trading v The Asia Insurance Co Ltd [1996] 2 MLJ 160 (refd)
Thompson v London, Midland and Scottish Rail Co [1930] 1 KB 41 (refd)
Whiten v Pilot Insurance Company [2002] 209 DLR (4th) 257 (refd)
Willis v Willis & Hodgson [1941] MLJ 169 (refd)

Legislation referred to

Arbitration Act 1952 s 24(2)
Courts of Judicature Act 1964 s 69(4)
Insurance Act 1963 s 44A
Rules of the Court of Appeal 1994 r 4
Rules of the Federal Court 1995 r 137
Rules of the High Court 1980 O 92 r 4

Appeal from: Originating Motion No Rl–25–114 of 1999 (High Court, Kuala Lumpur)

Belden Premaraj (PL Leong with him) (Sivananthan) for the appellant.
Khoo Eng Chin (Khoo & Sidhu) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The appellant is seeking a reversal of the High Court's judgment refusing to set aside an arbitrator's award. The award relates to claims made by the appellant against four different insurance companies on personal accident policies he had taken out with each of them. Of the four claims, three were dismissed by the arbitrator. He allowed the fourth but awarded interest at 8% per annum from the dated of the award, viz 17 September 1999 and not from the date of the accident which was on 26 June 1992. Since each claim has its own peculiarities I had better deal with them separately.

[2] But before I do that, there are two matters that I need to attend to. First, I need to set out the issues that the parties to the arbitration formulated for the arbitrator to decide. These read as follows:

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(1) Whether the first respondent had waived the requirement of disclosure by issuing the renewal certificate dated 11 March 1992 (CBD-8) without requiring the claimant to fill and submit a fresh proposal.

(2) Whether the said renewal certificate has been obtained by the claimant by misrepresentation and/or non-disclosure of material facts.

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(1) Whether the second respondent had waived the requirement of disclosure by issuing Policy No 12D/A220/92-002845 dated 13 May 1992 (RBD 12) without requiring the claimant to fill and submit a fresh proposal.

(2) Whether the said policy has been obtained by the claimant by misrepresentation and/or nondisclosure of material facts.

Leong Kum Whay v The Great Eastern Life Assurance Co Ltd

Whether Policy No PA718839-A dated 13 March 1992 (RBD 21-25) has been obtained by the claimant by misrepresentation and/or nondisclosure of material facts.

Leong Kum Whay v MUI Continental Insurance Sdn Bhd

Whether Policy No VP 0698 M dated 8 January 1991 (RBD 36-40) has been obtained by the claimant by misrepresentation and/or non-disclosure of material facts.

Dated this 6 July 1999.

[3] Next, I must remind myself of the kind of jurisdiction that is being invoked here. I do so because there is a great temptation to overlook the fact that an application to set aside an arbitrator's award is not an appeal. The grounds on which an award may be set aside are limited to there being an error of law on the face of the record or some misconduct on the part of the arbitrator. 'Misconduct' in this context has no pejorative connotation. It is a word that appears in s 24(2) of the Arbitration Act 1952. It is one of the grounds on which an award may be set aside.

It has been defined as follows by Raja Azlan Shah J in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 at p 211:

> Iation, misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated. In my judgment the plaintiffs' complaint is sustainable only if the failure to do so had occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award.

[4] With that I turn to deal with the award in relation to the first claim. This is against QBE Insurance ('QBE'). The original policy was issued on 7 March 1991. It was effective until 6 March 1992. During the currency of this personal accident policy, the appellant had obtained two life insurance policies from two other insurance companies. The original policy was renewed on 6 March 1992 for a further period of one year. The renewal was by means of a renewal certificate which, inter alia, said that the policy had been renewed for the stipulated period 'subject to all terms, conditions and endorsements' in the original policy.

[5] The accident in respect of which the appellant made his claim occurred on 26 June 1992. QBE repudiated liability and refused to pay. It said that there had been non-disclosure of a material fact by the plaintiff. Because he had not disclosed the life insurance policies when he had the policy renewed. To justify its repudiation it relied on both the proposal form in respect of the original policy as well as cl 6.3 of the policy.

[6] The proposal form contained the following three important matters. First, a declaration by the plaintiff that all answers and statements made in the proposal were true in every respect. Second, a statement that the proposal and declaration were the basis of the policy and were considered as being incorporated in it. This is what lawyers call a 'basis clause'. Its effect is that:

> when answers, including that in question, are declared to be the basis of the contract, this can only mean that their truth is made a condition, exact fulfilment of which is rendered by stipulation foundational to its enforceability (per Viscount Haldane in *Dawsons Ltd v Bonnin* [1922] 2 AC 413).

And:

> once parties to a policy agree that something should be the basis of their contract, it is not open to the court to consider the question of materiality (per Suffian FJ in *China Insurance Co Ltd v Ngau Ah Kau* [1972] 1 MLJ 52).

[7] The third matter of importance is the following question in the proposal:

> Are you at present insured against life, accident or sickness? If yes, give details of name of company, amount of insurance (capital sum and weekly benefit).

The appellant gave a negative response to this question.

[8] Now, the appellant's answer that he had no life insurance was accurate at the time when he gave it. But it was no longer true when the policy was renewed with the mutual consent of both parties. Was he obliged to tell QBE about the life policies before the renewal? The learned arbitrator said that he was. This is because the renewal of the policy had been by mutual consent and hence operated as a fresh contract of insurance. As such the appellant was under a duty to inform QBE about the life policies. Counsel for the appellant submits that the award in this instance contains an error of law. With respect I do not agree, I think that the award of the learned arbitrator accurately states the law on the point under discussion.

[9] To appreciate the point under discussion it is important to distinguish between a renewal of a policy and its mere extension. This vital distinction was adverted to by Deane J in *CE Heath Underwriting & Insurance (Australia) Ptv Ltd v Edwards Dunlop & Co Ltd* (1992) 112 ALR 161 as follows:

> The distinction between the renewal of a policy and the extension of a policy was expressed in the following terms by Mayo J in Re Kerr [1943] SASR8 at p l6:
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> > Strictly, a 'renewal' is descriptive of a repetition of the whole arrangement by substituting the like agreement in place of that previously subsisting, to be operative over a new period, whereas an 'extension' betokens a prolongation of the subsisting contract by the exercise of a power reserved thereby to vary one of its provisions, that is, by enlarging the period. Upon a renewal similar rights revest … A contract reserving continuous rights of renewal will, if these be exercised, lead to succeeding contracts in a series, the identity of each contract [being] separate and distinct. On the other hand, the exercise of the right of extension augments the length of time over which the contract operates, without changing its identity.
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> Whether there is a renewal or an extension of an insurance policy is a question of construction, (*GIO (NSW) v Kimmedy* (1988) 5 ANZ Insurance Cases 60-880, at 75,541) the term 'renewal' often being used to refer to both 'renewal' and 'extension' in the sense that those words are used above. It is, however, well established that, where a policy is renewable only by mutual consent (ie not as of right), the renewal results in a fresh contract rather than the extension of an existing contract (see *Re Kerr [1943] SASR*, at 15; *Halsbury's Laws of England* (4th Ed) Vol 25, para 494).
>
> Of course, a policy may expressly stipulate that it is not to continue in force beyond the period of insurance, unless renewed by mutual consent (see eg *Stokell v Heywood* [1897] 1 Ch 459. And where a policy, such as the ordinary form of life policy, expressly provides for continuation beyond the specified period of insurance unless a particular event, such as the non-payment of the premium, takes place, the renewal is an extension of the original contract (see *Re Anchor Assurance Co* (1870) LR 5 Ch App 632, at p 638). But where a policy is silent on the question of renewal, renewal of it will generally constitute a new contract (see *Ivamy, General Principles of Insurance Law* (5th Ed, 1986), pp 249–250.

[10] In my judgment, the position is this. When, as here a policy of insurance for a fixed period is renewed by mutual consent, the original proposal form becomes incorporated into the renewed policy and continues to form the basis of the contract. And more so in the present case where the renewal certificate expressly states that the

renewal is 'subject to all terms, conditions and endorsements in your original policy'. One of the terms in the original policy was cl 6.3 which reads as follows:

> Before renewing this policy, the insured shall give written notice to QBE of any material fact affecting this insurance which has come to the insured's notice during the preceding period of insurance including notice of any disease physical or mental defect or Infirmity affecting the insured person.

[11] Clause 6.3 says 'material fact'. Now, were the life policies a 'material fact' in this case? I think they were. When the renewal certificate said 'subject to all terms, conditions and endorsements in your original policy', it includes the declarations in the original proposal form which formed the basis of the contract. They too became part of the renewed policy. And so you have the appellant saying to QBE in the renewed policy that he did not have any life insurance. That is a material fact because of the basis clause. But it was untrue. Hence QBE was clearly within its contractual rights to refuse payment.

[12] Before concluding on this part of the case, it is necessary, for completeness to recall the two agreed issues that the arbitrator had to deal with. He resolved both in QBE's favour. Thus far I have only dealt with the second issue. I have done so because in my judgment the two issues are really tied up together. Ultimately the question is whether QBE was entitled to repudiate the contract. Once you accept that the life policies are a material fact and resolve the second issue in QBE's favour that is an end of the matter. No question of a fresh proposal form can arise when the renewal certificate says that the renewal is on the same terms and conditions as contained in the original policy. In any event, there is neither any error of law nor any misconduct by the learned arbitrator in respect of the first issue.

[13] For these reasons, the learned judge was entirely correct in upholding so much of the award that dismissed the appellant's claim against QBE.

[14] That brings me to the claim against Malaysia & Nippon Insurans Bhd ('Nippon'). The facts here are different from those of the QBE claim in important respects. It is not disputed that the original Nippon policy was issued for the period 25 February 1991 to 24 February 1992. On 17 February 1992, a fresh policy was issued for the period 25 February 1992 to 24 February 1993. There was no renewal certificate as there was in the QBE case. There was no incorporation clause as was housed in the QBE renewal certificate. There was no QBE policy cl 6.3 in the Nippon policy. There was no fresh proposal form. There was nothing in the second policy to say that it was issued pursuant to the earlier proposal form. Does all this make a difference? Counsel for the appellant says that it makes a world of difference. With respect, I do not agree. And I will explain why.

[15] It is settled beyond dispute that a contract of insurance is one that imposes a mutual duty on the parties to it to act uberrimae fides towards each other. On the part of the insured, he or she must make full disclosure of all material facts. It is not for him or her to decide in his or her own mind what is material. It does not matter whether the insurer asks any questions of the insured. The duty is on the insured to

make full disclosure of material facts within his knowledge. Whether a particular fact is material is a question of fact (see *Mann Macneal & Steeves Ltd v Capital & Counties Insurance Co Ltd* [1921] 2 KB 300). But the duty to make full disclosure of all material facts is not an implied term of a contract of insurance. There is in fact no contract at the point at which the duty arises; the parties being still at the stage of negotiations. It is therefore a pre-contractual duty imposed by the common law. I take these propositions to be settled by authority.

[16] I begin with *Rozanes v Bowen* (1928) 32 L1L Rep 98 at p 102 where Scrutton LJ said this:

> As the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters *without being asked* of all the material circumstances, because the underwriter knows nothing and the assured knows everything. That is expressed by saying that it is a contract of the utmost good faith — *uberrima fides*. (Emphasis added.)

Rozanes v Bowen was referred to by May J in *March Cabaret Club & Casino Ltd v London Assurance Ltd* [1975] 1 Lloyds Rep 169 at p 175, where he said:

> Bearing in mind the basis of the rule however, which is, as Lord Justice Scrutton pointed out, the fact that there is a disparity in negotiating position between the intending assured and insurers, in my judgment the duty to disclose is not based upon an implied term in the contract of insurance at all; it arises outside the contract; it applies to all contracts uberrimae fidei and is not limited to insurance contracts; it also applies, for instance, to contracts of partnership, contracts of surety, certain family settlement contracts and other similar types of contractual relationship.

[17] Speaking of the duty imposed upon an insured, Cohen LJ in *Schoolman v Hall* [1951] Lloyd's Rep 139 at p 143 said:

> So, I think, applying those observations here, while the insurers have stipulated that the answers to the fifteen questions 'shall be the basis of the contract', that only has the effect of preventing any argument as to the materiality of those questions should dispute arise, but *it does not relieve the proposer of his general obligation at common law to disclose any material* which might affect the risk which was being run, or *which might affect the mind of the insurer as to whether or not he issue a policy.* (Emphasis added.)

[18] The nature of the duty to make disclosure was also considered by Lord Jauncey of Tullichettle in *Banaue Financiere Pe La Cite SA v Westeate Insurance Co Ltd* [1991] 2 AC 249 where he said:

> The duty of disclosure arises because the facts relevant to the estimation of the risk are most likely to be within the knowledge of the insured and the insurer therefore has to rely upon him to disclose matters material to that risk. The duty extends to the insurer as well as to the insured: *Carter v Boehm* (1766) 3 Burr 1905 [(1766) 97 ER 1162]. The duty is, however, limited to facts which are material to the risk insured, that is to say, *facts which would influence a prudent insurer in deciding whether to accent the risk* and, if so, upon what terms and a prudent insured in entering into the contract on the terms proposed by the insurer. Thus any facts which would increase the risk should be disclosed by the insured and any facts known to the insurer but not to the insured, which would reduce the risk, should

A be disclosed by the insurer. There is, in general, no obligation to disclose supervening facts which come to the knowledge of either party after conclusion of the contract (*Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179), subject always to such exceptional cases as a ship entering a war zone or an insured failing to disclose all facts relevant to a claim.

B

[19] So much for the insured's duty. For completeness I would add that there is a corresponding duty on the part of an insurer to act with utmost good faith towards its insured. In *Maschke Estate v Gleeson* (1986) 54 OR (2d) 753 at p 756, Montgomery J put the duty in this way:

C A contract of insurance is one of uberrimae fides, the utmost of good faith. This is not a situation where an insurer is indemnifying its assured and paying a third party. This is a case where the insurer is being asked to pay its own insured. The duty to act promptly and in good faith arises the day the insurer receives the claim. To find otherwise is to fail to understand the realities of the market place.

D

[20] More recently, in *Katotikidis v Mr Submarine Ltd* [2002] ACWSJ 10135, Taliano J referred to the judgment of the Supreme Court of Canada in *Whiten v Pilot Insurance Company* [2002] 209 DLR (4th) 257 as follows:

E I note that in upholding the award of punitive damages in Whiten, the court observed that a contract between an insurer and its insured was one of utmost good faith because, although the insurer is not a fiduciary, it holds a position of power over an insured since the insured is in a vulnerable position and is entirely dependent on the insurer when a loss occurs. For that reason, in every contract of insurance, an insurer has an implied obligation to deal with the claims of its insured's in good faith. It was held that a breach of the implied duty of good faith meets the requirement of an independent actionable wrong.

F

[21] I return to the present instance. There is no doubt that Nippon's original policy and its second policy are two different contracts. In *Manufacturers' Mutual Insurance Ltd v John H Boardman Insurance Brokers Ptv Ltd 120 ALR* , Mason CJ, Toohey and McHugh JJ said:

G

Under the general law, the renewal of a contract of insurance that is only renewable by mutual consent, and not by right, results in a fresh contract separate from the pre-existing contract of insurance.*CE Heath Underwriting & Insurance (Australia) Pty Ltd v Edwards Dunlop & Co Ltd* (1993) 176 CLR 535 at pp 545–546; 112 ALR 161. See also *Ivamy, General Principles of Insurance Law* (1986) pp 247–250.

H

[22] Was the appellant duty bound to disclose the other personal accident policies to Nippon before it issued the second policy? Based on the authorities I have earlier discussed, that question must be answered in the affirmative. Nippon considered the existence of other personal accident policies to be of significant importance to it. That is why it had put the question about it in its original proposal form. The appellant had answered that question in the negative. His answer was true at the time he gave it. But it was no longer true when the second policy was issued. The appellant must, as a reasonable man be taken to have known the importance that Nippon attached to the existence of other personal accident policies. Accordingly, the materiality of the

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fact not disclosed by the appellant was inferentially established before the learned arbitrator. And the arbitrator was therefore entirely correct as a matter law in rejecting the appellant's claim against Nippon.

[23] With that I now turn to the appellant's claim against The Great Eastern Life Assurance Co Ltd ('Great Eastern'). The facts here are as follows. On 15 March 1992, Great Eastern issued a personal accident policy to the appellant valid for one year. It was based on a proposal form dated 13 March 1992. It contained the following question:

> What Accident, Sickness or Life Insurance do you now carry or applied for?

The answer that appears in the form discloses two life policies and one personal accident policy. In fact, the appellant had two life and seven personal accident policies. The learned arbitrator found as a fact that the appellant had disclosed all these nine policies to one Lee Kow Eee, an agent of Great Eastern who witnessed the proposal form. The learned arbitrator found for Great Eastern on the ground that the disclosure to Lee was not disclosure to Great Eastern. He held that Lee was only a life insurance salesman for Great Eastern and on Lee's own admission had no authority to deal with personal accident policies. The learned arbitrator mentioned s 44A of the Insurance Act 1963 but held that it did not assist the appellant and that the case was governed by the pre-existing common law. It is therefore necessary first to examine the position at common law and then see what exactly it is that the section does.

[24] The position at common law is this. Where an insurer's agent either fills in or assists in the filling in of a proposal form, he acts in that instance as the agent of the insured and not the insurer. It did not matter that the proposer was illiterate. The common law regarded illiteracy as a misfortune and not a privilege (see *Thompson v London, Midland and Scottish Rail Co* [1930] 1 KB 41). It followed that any untruth in the proposal bound the proposer even if it was the agent and not he who was its author. As Lord President Azmi said in *China Insurance Co Ltd v Ngau Ah Kau*:

> Before us it was argued for the appellant that when Mr Hoe was helping the plaintiff to fill up the proposal form he was merely acting as the agent of the plaintiff and not the company. In *Biggar v Rock Life Assurance Co* [1902] 1 KB 516, the proposal form was filled by the agent, many of the answers filled in by him being false in material aspects, but the false answers were inserted without the knowledge or authority of the applicant, who signed the proposal form without reading it. The proposal contained a declaration that the applicant agreed that the statements in the proposal should form the basis of the truthfulness of the statements in the proposal. It was held that in filling up the answers in the proposal form the agent was acting as the agent of the applicant.

[25] His Lordship then quoted the following passage from the judgment of Scrutton J in *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356:

> In my view, the important question for the decision of this case is whether the knowledge of the agent, acquired in filling up the proposal for the assured, is to be taken as the knowledge of the company. If the person having authority to bind the company by making a contract in fact knows of the untruth of the statements and yet takes the premium, the

question may be different. Even then I see great difficulty in avoiding the effect of the writing signed by the proposer that the truth of the statements is the basis of the contract. But where the person contracting for the company has no knowledge but only constructive notice, the difficulties of the proposer are greater. In commercial matters, the doctrine of constructive notice is not favoured; see the explanation by Lindley LJ in *Manchester Trust v Furness* [1895] 2 QB 539 at p 545.

[26] Now, as you can see, the common law was harsh. It produced unjust consequences. Many innocent insured persons found themselves unprotected by insurance after paying premiums over a considerable period of time. Their legitimate expectation to be indemnified against losses was defeated by the agency rule. It is to remedy this position that Parliament intervened. It enacted Section 44A which came into force on 3 March 1978 by virtue of A432. The section reads:

(1) A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.

(2) Any statement made or any act done by any such person in his representative capacity shall be deemed, for the purpose of the formation of the contract, to be a statement made or act done by the insurer notwithstanding any contravention of section 16A or any other provision of this Act by such person.

(3) This section shall not apply —

(a) where there is collusion or connivance between such person and the proposer in the formation of the contract; or

(b) where such person has ceased being its agent and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general the fact of such cessation.

[27] Some comment is necessary about the section. It requires, first, that there be an agent who is authorised by an insurer. Second, such an agent must solicit or negotiate a contract of insurance in his capacity as agent. Once these two conditions are satisfied certain consequences follow. First, the agent is deemed to be the agent of the insurer for the purpose of the formation of the contract. Second, the knowledge of the agent about any fact that is relevant to the insurer accepting the risk is treated as the knowledge of the insurer. What s 44A (1) does is this. Where an insurer holds out that a person is its agent, then the knowledge of the agent is deemed to be the knowledge of the insurer. The only two circumstances in which sub-s (1) does not bite are spelled out in sub-s (3). These are collusion or connivance between the agent and the insured; and cessation of agency of which the insurer has taken reasonable steps to inform the public at large.

[28] There can be no doubt that s 44A targeted the reversal of the common law. That is the way in which the section was construed in the carefully written judgment of Abdul Malik Ishak J in *Syarikat Uniweld Trading v The Asia Insurance Co Ltd* [1996] 2 MLJ 160 with which I agree. The section is remedial. Hence it must be 'given a benevolent interpretation' (per Aitken J in *Willis v Willis & Hodgson* [1941]

MLJ 169. Crawford in his authoritative work, *The Construction of Statutes* (1978 Reprint) at p 494 says this about remedial statutes:

> To understand the reason for giving remedial statutes a liberal construction, it is necessary that we know what statutes fall within this category. While they have been defined in a preceding section, for the sake of convenience, some slight repetition will be valuable. For our discussion here, however, it will be sufficient to define a remedial statute as one which remedies a defect in the common law or in the pre-existing body of statute law. Such statutes play an important part in the jurisprudence of an advancing society. They supply the defects and abridge the superfluities in pre-existing law, which arise from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of judges, and from any other cause. They serve to keep our system of jurisprudence up-to-date and in harmony with new ideas or conceptions of what constitute justice and proper human conduct. Their legitimate purpose is to advance human rights and relationships. Unless they do this, they are not entitled to be known as remedial legislation nor to be liberally construed. Manifestly, a construction which promotes improvement in the administration of justice and the eradication of defects in our system of jurisprudence, should be favoured over one which perpetuates wrong. It seems proper to assume that the lawmakers intended to advance our laws forward as far as our conceptions of justice and proper conduct extend. For this reason, if no other, remedial legislation is entitled to a liberal construction.

[29] Unfortunately, the learned arbitrator placed a very narrow and restrictive interpretation on s 44A. He construed the words 'a person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity' as enabling an insurer to place limits on the agent's authority. But the section does not admit that. It speaks of the authority in general terms. It does not say that the agent must be authorised to deal with a specific type of insurance. By reading it restrictively the learned arbitrator was introducing a further exception to those already provided by sub-s (3). This, in my judgment, amounts to unauthorised legislation.

[30] For these reasons, the award in respect of the appellant's claim against Great Eastern is fatally flawed by an error of law and must be set aside.

[31] That leaves the award in respect of the appellant's claim against MUI Continental Insurance Sdn Bhd. Here the learned arbitrator found for the appellant. But he awarded interest on the sum claimed only from the date of the award and not from the date of the accident. And he gave no reasons for not making the award. Learned counsel for the insurer submits that the awarding of interest is a matter of discretion and that there is no misconduct or error of law disclosed. With respect, I am unable to agree.

[32] In the first place it is well settled that an arbitrator, in the absence of a specific clause in the agreement, has power to award interest (see *Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd* [1994] 2 MLJ 51; *Executive Engineer v DN Senapati* AIR 1980 Orissa 74). In the second place, the general rule in a claim for a debt (and this was a debt owed by the insurer to the appellant) is that interest must run from the date on which the debt became due and payable (see *Murtadza bin Mohamed Hassan v Chong Swee Pian* [1980] 1 MLJ 216). In this case, it should have been from the date

of the accident. Because that is when the debt accrued. Here the learned arbitrator was departing from established practice having the force of law. He would have been entitled to do so if he thought that there were reasons for depriving the appellant of interest for the relevant period. Here he delivered a speaking award. What is a speaking award? It is an award 'which deals with all issues of fact and law and the findings of fact being final and conclusive' (per Lai Kew Chai J in *Artic Builders & Co (Pte) Ltd v Tan Tong Meng Co (Pte) Ltd* [1984] 2 MLJ 5 (CA)). So here the learned arbitrator was obliged to give his reasons for refusing to award interest in the usual way. His award is therefore liable to be set aside for misconduct in the sense that there has been some 'irregularity of action which is not consonant with the general principles of equity and good conscience' (see per Raja Azlan Shah J in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*). At the risk of repetition, there was in this case irregularity of action inconsonant with the general principles of equity and good conscience because the learned arbitrator, without reasons departed from the established principle of awarding interest on a debt. But that is not the end of the matter as there is a difficulty in this case.

[33] In the ordinary way, this court would remit the award to the arbitrator with the appropriate direction to him. But here the learned arbitrator has passed away and no remitting order can therefore be made. The other course that is open to us is to set aside the whole award of interest. But if we do that, the appellant will lose even the post-award interest made by the learned arbitrator. That would be an injustice. Does that mean that we cannot do anything about it? I think we can. We are not helpless.

[34] It is to meet such situations as the present that s 69(4) of the Courts of Judicature Act 1964 was designed to meet. That section empowers us to 'make any order which ought to have been given or made, and make such further or other orders as the case requires'. The section enables this court to do complete justice between the parties (see *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489; *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 (FC)). Further, there is O 92 r 4 of the Rules of the High Court 1980 which provides:

> For the removal of doubts, it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the High Court to make any order as may be necessary to prevent an abuse of the process of the court.

This rule of court is available to us because of r 4 of the Rules of the Court of Appeal 1994. It is jurisdictional in nature (see *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143).

[35] Rule 137 of the Rules of the Federal Court 1995 is *ipsissima verba* O 92 r 4. It says:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to hear any to prevent an abuse of the process of the court.

And in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385. Steve Shim CJ (Sabah & Sarawak) said when discussing r 137:

> Where there is a clear case of injustice being committed, the Federal Court, as the apex court hi the land, cannot stand idly by and do nothing. It cannot and should not shirk from its responsibility of preventing injustice in appropriate cases. It must deal with it. In this regard, the Federal Court has been conferred with inherent powers under r 137 of the Rules of the Federal Court 1995 ('the RFC'). This has been reiterated very recently by the Federal Court in *Chia Yan Teck & Anor v Ng Swee Keat & Anor (Civil Appeal No 02–03–98(B)* , when Mohamed Dzaiddin Chief Justice said, inter alia:
>
> > Rule 137 of the Rules clearly gives us the inherent power to hear any application or make any order as may be necessary to prevent injustice.
>
> In addition, I take the view that the Federal Court also has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustices in limited circumstances.

[36] In my judgment, this court has ample jurisdiction and powers to deal with difficulty that has arisen in the present instance. There is nothing in the Arbitration Act 1952 that prohibits us from making an award of interest in a case as the present. Indeed, that Act is silent about what is to happen where an arbitrator dies. Neither is there anything in the arbitration clause in the relevant policy that says what is to happen in a situation such as the present. There is therefore nothing in our way in doing justice in this case. To meet the ends of justice I would accordingly order that the learned arbitrator's award in respect of the fourth respondent do bear interest at the rate of 8% from the date of the accident.

[37] For the reasons already given, I would confirm the orders of the High Court in respect of the first and second respondents and set aside the award the award in respect of the third respondent. In respect of fourth respondent, I would make the order adverted to in the previous paragraph of this judgment.

[38] As for costs, it is clear that the appellant has only partially succeeded in his appeal. He has lost on two counts and succeeded on the other two. I think that in the circumstances of this case he should receive only half his costs here and in the court below.

[39] My learned brothers Mohd Ghazali and Azmel JJCA have seen this judgment in draft and have expressed their agreement with it.

Order accordingly.

Reported by Peter Ling